Billboard Regulation In Ohio

This article is an analysis of the legal principles applicable to the regulation of billboards other than by zoning ordinance.

An increasing interest in the regulation of billboards is indicated by a recent Ohio Supreme Court decision[1] and by two bills introduced during the last session of the Ohio General Assembly.[2]

The problem of regulating billboards is not new in Ohio or elsewhere. As early as 1902 the state granted to municipalities specific power to regulate them.[3] Essentially the same statute exists today.[4] Local zoning ordinances were enacted pursuant to this grant of authority. They were challenged as being an unreasonable interference with private property.[5] The history of that legal struggle and the gradual development of the standards required for that type of regulation is amply recorded[6] so that reference to it will be made only where applicable to the present discussion. It will suffice here to observe that several larger cities today have comprehensive zoning ordinances which provide some measure of control of billboards within the municipality.[7]

Present interest appears to center upon regulation along state highways. The two principal means of control considered here are the state police power and the application of the power of eminent domain.

Billboards As Property

To discuss the use of either the police power or the power of eminent domain it is necessary to determine the essential nature of any "right" to erect billboards.

It is implicit in the language of the courts of Ohio in the cases challenging the validity of municipal ordinances regulating billboards that they consider the right to erect them to be a property right.[8] Such

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[1] Ellis v. Ohio Turnpike Commission, 162 Ohio St. 86, 120 N.E. 2d 719 (1954).

[2] S.B. 55, introduced January 17, 1955; identical bill, H.B. 349, introduced February 2, 1955. Neither of these bills passed.

[3] 96 Ohio Laws 23 (1902). This statute gave municipalities power "To regulate the erection of . . . fences, billboards, signs, and other structures within the corporate limits, ..."

[4] Ohio Rev. Code §715.27 is substantially the same as 96 Ohio Laws 23 (1902).

[5] For example, see ordinance set out in State *ex. rel.* Morton v. Rapp, 16 Ohio N. P. (n.s.) 1, 99 Ohio Dec. 596 (1914).

[6] See for example, Ruth F. Wilson, *Billboards and the Right to Be Seen From the Highway,* 30 Georgetown L.J. 723 (1941-42); Henry W. Proffitt, *Public Esthetics and the Billboard,* 16 Cornell L.Q. 151 (1931); J. Lester Mee, *Validity of Muncipal Regulation of Outdoor Advertising,* 4 John Marshall L.Q. 323 (1939).

[7] Building and Zoning Code of Cincinnati 488, c. 17 (1952); Codified Ordinances of Cleveland, §§5.1110(8), (9), 5.1112(2) (K) (1951); General Ordinances of Dayton Vol. 1 §§211(10)(e), (f), (g), 225(e) (1954).

[8] State *ex rel.* Morton v. Hauser, 17 Ohio App. 4 (1922); State *ex rel.* Morton v. Rapp, note 5, *supra;* Cusack v. Cincinnati, 9 Ohio N.P. (n.s.) 466 (1910). In *State ex rel. Morton v. Hauser,* the court said "We do not find that these

a concept is not consonant with the older, more narrow view that "property" consists of so much physical land or physical assets. The modern and more elastic concept of property embraces within the term not only the physical res but the legal rights and privileges resultant from ownership. Nichols, in his work on eminent domain states:

> The word "property", as used in the constitutional provisions that property shall not be taken for public use without just compensation is treated as a word of most general import and is liberally construed . . . it has been used to indicate the aggregate rights which an owner possesses in or with respect to such corporeal object.[9]

The Ohio Supreme Court in *Smith v. Erie Rd. Co.*,[10] although denying that there had been a taking of any property by the delay of a railroad in completing a grade crossing elimination stated:

> . . . The broader view, which now obtains generally, conceives property to be the *interest* of the owner in the thing owned . . . Under this broad construction there need not be a *physical* taking of the property or even dispossession, any substantial interference with the elemental rights growing out of ownership of private property is considered a taking.
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> In Ohio the broad interpretation prevails and compensation has been allowed for loss of riparian rights, for the impairment of the abutting owner's right in the street, which is in the nature of an *incorporeal hereditament*, for the casting of extraneous and annoying substances on the owner's land and in many other instances; . . .[11] (Emphasis supplied.)

In *Crawford* v. *Delaware*,[12] the city changed a street grade. It took none of the plaintiff's land but impaired his access to the street. The supreme court allowed recovery saying:

> . . . We hold that when the avenue to the place of business of the lot-owner, and his use of the street as an incident to his permanent erections, is thus blocked up or taken from him, after the establishment, and by alteration of a grade, the private *rights* of the owner, inherent in and incident to the erections upon the lot, are invaded . . .
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> It is as positive and substantial an injury to private property, and as direct an invasion of private right, incident to a lot, as if the erections upon the lot were taken for public use. It comes not within the letter, but is manifestly within the spirit[13]

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ordinances . . . constitute an unreasonable interference with the use of private property."

[9] 2 NICHOLS ON EMINENT DOMAIN §5.1 (1950).

[10] Smith v. Erie Rd. Co., 134 Ohio St. 135, 16 N.E. 2d 310 (1938).

[11] *Id.* at 142. This language was quoted with approval in State *ex rel.* McKay v. Kauer, 156 Ohio St. 347, 353, 102 N.E. 2d 703 (1951).

[12] 7 Ohio St. 460 (1857).

[13] Perhaps such a taking was not, in this Court's view, within the letter of the constitution because of the then prevalent concept of public use which required

> of the provision of the constitution which requires compensation for property taken for public use.[14] (Emphasis supplied).

This is as clear a holding as can be found of the proposition that the right of use is as fundamental as the corporeal property itself, within the purview of the Ohio Constitution. This language of the *Crawford* case has been consistently followed.[15]

Central Outdoor Advertising Co. v. *Evendale*[16] indicates that this principle is broad enough to protect advertising companies which had acquired rights from landowners to erect billboards. In that case an advertising company challenged a village ordinance prohibiting billboards. The court declared the ordinance invalid stating:

> . . . The question is practically the same under both constitutions, [Ohio and United States] namely, are Ordinances No. 8-1952 and the Zoning Ordinance of 1953 invalid in that they violate constitutional protection "of right of property in the plaintiff", by attempted regulations, under the police powers, which totally prohibit the carrying on of the legitimate business of the plaintiff . . .[17]

In a recent Ohio Court of Appeals case a billboard company was allowed to challenge a zoning ordinance regulating billboards.[18]

Thus it would appear that the right to erect billboards in Ohio is a property right not only in the owner of the land on which they are erected but also in one who has acquired the right from the owner, as well.

State Regulation — Police Power

As already pointed out, the General Assembly early assumed the attitude that billboard regulation was primarily a local matter. However, state statutes were passed prohibiting the erection of billboards in such positions that they obstruct the view of motorists at highway intersections[19] and prohibiting billboards which contained images of stop signs and railroad crossing signs.[20] The relation of these statutes to public safety is so apparent as to obviate any question as to their validity as an exercise of the police power.

No widespread program of regulation along the highways has ever been adopted by Ohio. The bill introduced in the 1955-56 session of the General Assembly, if passed, would have inaugurated such a pro-

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occupation and enjoyment. See Pontiac Improvement v. Board of Park Commissioners and discussion, *infra* p. ___.

[14] Note 12 *supra,* at 471.

[15] Reeve v. Treasurer of Wood County, 80 Ohio St. 333 (1858); Mansfield v. Balliett, 65 Ohio St. 451, 63 N.E. 86 (1901); State ex. rel. McKay v. Kauer, note 11 *supra.*

[16] 54 Ohio Op. 354 (1954).

[17] *Id.* at 356.

[18] Criterion Service Inc. v. East Cleveland, 55 Ohio L. Abs. 90, 88 N.E. 2d 300 (1949).

[19] Ohio Rev. Code §5547.04.

[20] Ohio Rev. Code §5589.32.

gram on turnpikes throughout the state. It would have prohibited the erection of billboards, with certain minor exceptions relating to advertising on the premises, within 500 feet of any turnpike project.[21] Other states have statutes regulating billboards within varying distances from highways.[22]

Would a law such as the proposed Ohio law, prohibiting billboards along highways be held to be a valid exercise of the police power in Ohio?

The first cases challenging billboard regulation involved ordinances. In those cases the billboard portion of the ordinance was considered alone and without consideration to its place as part of a broader regulation of property uses.[23] An Ohio court held to be unreasonable requirements that no billboard be less than fifteen feet from the street line, that no billboard be nearer the lot line than the building on the adjoining lot and that no billboard be erected so as to face any public park, square, or municipal, county or federal building unless a permit be obtained.[24]

In the leading case of *Euclid v. Ambler Realty Co.*[25] the United States Supreme Court paved the way to a more liberal approach. In this case the Village of Euclid adopted a comprehensive zoning ordinance which set out in detail the uses which could be made of lands within each of six zones. Among the use restrictions, was one excluding billboards from all except zones U-5 and U-6. The ordinance as a whole was challenged as being an unconstitutional interference with the use of property. The United States Supreme Court sustained the ordinance in general as a reasonable promotion of public health, safety and general welfare.

In a recent case an Ohio Court of Appeals stated that "Outdoor advertising is a business that is subject to classification as all other commercial enterprises,"[26] and held that a zoning ordinance was reasonable which prohibited billboards, except for accessory use, in retail store districts but permitted them in commercial districts. So the question of regulation by zoning appears to be resolved in favor of allowing rigid restrictions of billboards which would undoubtedly have been invalid within the holdings of the earlier cases. As the Indiana Supreme Court

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[21] Note 2 *supra.*

[22] For example, New York requires a permit before construction of billboards within 500 feet of the New York Thruway System. 42 NEW YORK LAWS OF 1952, (Supp 1955) §361a. Maine and Mississippi prohibit signs nearer than 50 feet of the highway ME. REV. STAT. c. 23 §142 (1954), MISS. CODE ANN. §8159 (1942). Vermont provides that signs containing 300 square feet or more of surface shall be at least 300 feet from the center of the used portion of the highway and signs under 300 square feet shall be as many linear feet removed as there are square feet on the face of the sign, but in no case nearer than 35 feet. VERMONT REV. STATUTES §7689 (1947).

[23] See cases cited in note 8 *supra.*

[24] State *ex rel.* Morton v. Rapp, note 5 *supra.*

[25] 272 U. S. 365 (1926).

[26] Criterion Service, Inc. v. East Cleveland, note 18 *supra.*

has said: ". . . Restrictions which years ago would have been deemed intolerable and in violation of the property owners' constitutional rights are now desirable and necessary, and zoning ordinances fair in their requirements are usually sustained."[27]

The problem of regulating billboards along highways has been approached in various ways by courts of other states. In *Churchill and Tait* v. *Rafferty*,[28] the validity of a Phillipine Island law, enacted while the Philippines were an American possession, which empowered their Collector of Internal Revenue to remove "any sign, signboard, or billboard displayed or exposed to public view [if it be] offensive to the sight or otherwise a nuisance", was challenged as a deprivation of property without due process of law. The Court said:

> . . . Man's aesthetic feelings are constantly being appealed to through his sense of sight . . . Governments have spent millions on parks and boulevards and other forms of civic beauty, the first aim of which is to appeal to the sense of sight. Why, then, should the Government not interpose to protect from annoyance this most valuable of man's senses as readily as to protect him from offensive noises and smells.[29]

This nuisance approach is rather ingenious in that it is consonant with the concept of property rights and avoids the stigma of prohibiting the use of property for mere aesthetic purposes.

Then the court set forth a second approach when it said:

> . . . Suppose the owner of private property, who so vigorously objects to the restriction of this form of advertising, should require the advertiser to paste his posters upon the billboards so that they would face the interior of the property instead of the exterior. Billboard advertising would die a natural death if this were done, and its real dependency not upon the unrestricted use of private property but upon the unrestricted use of the public highways is at once apparent . . . Hence, we conceive that the regulation of billboards and their restriction is not so much a regulation of private property as it is a regulation of the use of the streets and other public thoroughfares.[30]

A Vermont case is significant in its approach to the right of one other than the landowner to erect billboards. In the case of *Kelbro, Inc. v. Myrick*[31] a billboard company challenged the Vermont statute prohibiting signs nearer than 300 feet from a highway intersection. The court held that the right to erect billboards was appurtenant to the land. Citing Goddard on Easements, the court stated:

"[A] right of way appurtenant to a dominant tenement can be

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[27] General Outdoor Adv. Co. v. Indianapolis, 202 Ind. 85, 172 N.E. 309, 313 (1930).

[28] 32 P.I. 580 (1915) *App. dismissed,* 248 U. S. 591 (1918).

[29] *Id.* at 609.

[30] *Ibid.*

[31] Kelbro, Inc. v. Myrick, 30 A. 2d 527. (Vt. 1943).

> used only for the purpose of passing to or from that tenement. It cannot be used for any purpose unconnected with the enjoyment of the dominant tenement, neither can it be assigned by the owner to another person and so be made a right in gross, nor can he license anyone to use the way when he is not coming to or from the dominant tenement . . ."
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> No invasion of the plaintiff's constitutional rights appears.[32]

It should be noted that a recent lower court case in Ohio apparently assumed that a billboard company had such a property right in the business of constructing billboards and was within the protection of the Ohio Constitution.[33] In that case the Court of Appeals gave no indication that the advertising company had no right to sue but held only that the regulation was reasonable as applied to the company. Thus the case appeared to be contra to the *Kelbro case*, which held that the lessee of the right to erect billboards did not have such a right as to entitle him to constitutional protection.

These approaches allow far-reaching regulation of billboards. The nuisance approach of the Philippine Island case has possible application in Ohio. It is consonant with the Ohio view that the right to erect billboards is a property right. But under that approach, the *use* of the right is found to be unreasonable and therefore a nuisance.

In an action claming nuisance, and with no legislation prohibiting such an establishment, an Ohio Court of Appeals held that a junk yard was a nuisance.[34] However the court rejected the fact of the unsightliness of the junk yard as the basis of its holding. Rather it held that it was impossible as a matter of law to operate the junk yard without the emission of noxious odors and gas and that therefore its operation constituted a nuisance. In *Harford v. Dagenhart*,[35] a more recent case, the Court of Appeals of Clark County held that an undertaking establishment would be a nuisance even though no noxious odors or gases would be emitted. It took the position that the constant reminder of death created by an undertaking establishment had a depressing effect on people, thereby rendering its maintenance a nuisance. The court thereby recognized that a use of property could be a nuisance although such use did not affect neighbors or their land by emitting any form of noxious odors, gases or noises. Such expansions of the traditional nuisance concept suggests that a court could adopt the view that the use of property to erect billboards is a nuisance because such use affects the safety of persons driving upon a highway. Such a finding would avoid the problem the courts have had in relying upon purely aesthetic grounds.

Of course if a court found a sufficient relationship between billboards and public safety, the employment of the nuisance concept would be

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[32] *Id.* at 530, 531.

[33] Note 18 *supra.*

[34] Bohley v. Crofoot, 7 Ohio L. Abs. 667 (1929).

[35] 28 Ohio L. Abs. 308 (1936).

unnecessary. But if the court were hesitant to find sufficient correlation to uphold a statute based on public safety alone, the addition of the nuisance argument may be persuasive.

Whether the court could make such a finding depends upon whether there is sufficient positive correlation between traffic accidents and the presence of billboards to justify declaring their presence to be a public nuisance. Certainly the controlling purpose for the erection of billboards is to influence travelers upon the highways. Many cases have given recognition to this fact.[36]

The New York Court of Appeals and the United States Supreme Court recognized that there is sufficient relation between safety and advertising on moving vehicles to sustain a municipal ordinance effecting its prohibition.[37] The Ohio Supreme Court in *Ellis v. Ohio Turnpike Commission*[38] indicated that it thought there was some relation between billboards and highway safety. At least one study indicates that the number of accidents increases with the number of billboards.[39] One explanation for this is that billboards are present because of the large amount of traffic, and this large amount of traffic, not the billboards, is responsible for the increased accident rate. Yet, the fact that the purpose of the billboard is to gain attention, cannot be discounted.

There are a number of provisions which could be inserted in any police power regulation to limit its breadth and enhance its chances of being upheld.

Thus, restrictions on billboards could be limited to only those highways where an administrative agency has found their presence to be a traffic hazard. Absolute prohibition could be imposed only for a reasonable distance from the highway. To insure consistency, any such distance limitation should be a specified distance from the outer edge of the trav-

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[36] Churchill and Tait v. Rafferty, note 28 *supra;* Kelbro, Inc. v. Myrick, note 31 *supra;* General Outdoor Advertising Co. v. Department of Public Works, 289 Mass. 149, 193 N.E. 799 (1935) *App. dismissed,* 297 U. S. 725. In the latter case the court stated: "Another basis for the rules and regulations is that they tend to protect people traveling upon highways from the intrusion of the public announcements thrust before their eyes by signs and billboards . . . . This is not a mere matter of banishing that which in appearance may be disagreeable to some. It is protection against intrusion by foisting the words and emblems of signs and billboards upon the mass of the public against their desire." (p. 814)

[37] Fifth Avenue Coach Co. v. City of New York, 194 N.Y. 19, 86 N.E. 824 (1909) *aff'd* 221 U. S. 467. Also, in Perlmutter v. Green, 259 N. Y. 327, 182 N.E. 5 (1932), the New York Court of Appeals in referring to the right of the superintendent of public highways to erect barriers to hide the view of a billboard said: "Again, if the purpose is to shut out from view scenes which might distract the attention of the driver of a car, the superintendent may aim to make the highway safer for those who use it by erecting screens to keep the eye of the driver on the road as he may erect barriers to keep the car on the road on dangerous curves. (p. 6)

[38] See discussion at note 22, *supra.*

[39] Highway Improvement Research Board, Bulletin No. 55, 35, 36 (1952).

eled portion of the highway. On divided highways, for example, a distance measured from the center of the right-of-way, may prohibit billboards for an unreasonable distance at one point and allow them in close proximity at another. Further it would seem desirable to make some distinction between existing billboards and those to be erected in the future. Unreasonable deprivation of property is more likely to be found as to a physical structure which has already been erected. As to existing structures, the deprivation is of physical property in addition to the right to use of the land. A number of cases indicate that a greater showing of necessity is needed to sustain a requirement for removal of existing billboards. An Ohio court has held that where a billboard was not in violation of a statute or ordinance when erected, its maintenance would not be enjoined unless the public safety required it.[40] The Indiana Supreme Court sustained an ordinance, adopted pursuant to statutory authority, as applied to future billboards, but declared it invalid as applied to existing billboards.[41]

A possible approach to this problem of existing structures is an application of an amortization principle, i.e., allowing the existing billboard to stand for the period of its estimated life but prohibiting alteration or replacement. An analogous use of the principle has been tried in zoning as to non-conforming uses. Such a provision cushions the deprivation aspect of regulation.[42]

STATE REGULATION — EMINENT DOMAIN

An alternative or at least a supplemental solution to the problem of billboard regulation appears to be the use of the power of eminent domain.

Lewis gives the following definition of the power: "Eminent domain is the right or power of a sovereign state to appropriate private property to particular uses, for the purpose of promoting the general welfare."[43] Judge Cooley defines it as authority to "appropriate and *control* individual property for public benefit, as the public safety, necessity, convenience, or welfare may demand."[44] (Emphasis supplied.) This power is exclusive with the sovereign but it may be delegated. However, any delegation of the power will be strictly construed.[45]

In Ohio, the sovereign power of eminent domain is limited by the constitution, which provides:

> Private property shall ever be held inviolate but subservient to the *public welfare*. When taken in time of war or other

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[40] Belton v. Thomas Cusack Co., 3 Ohio L. Abs. 276 (1925).

[41] General Outdoor Adv. Co. v. Indianapolis, note 32 *supra*.

[42] For a discussion of this principle see note, 15 OHIO ST. L.J. 470 (1954).

[43] 1 LEWIS, EMINENT DOMAIN 1 (1900).

[44] COOLEY, CONSTITUTIONAL LIMITATIONS 524 (1890).

[45] Pontiac Improvement Co. v. Board of Park Comm'rs., 104 Ohio St. 447,-135 N.E. 635 (1922); McMechan v. Board of Education of Richland Twp., 157 Ohio St. 241, 105 N.E. 2d 270 (1952); 15 O. JUR., EMINENT DOMAIN §12 (1931).

> public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for *public use*, a compensation therefor shall first be made in money . . . (Emphasis supplied.)[46]

Ohio courts have held that the right to erect billboards is property entitled to be held inviolate within the protection of this constitutional provision.[47] The question is therefore whether the right is subject to the power of eminent domain as circumscribed by that same provision, i.e., whether such an appropriation would be a *taking for a public use.*

This consideration raises, directly, the question of whether *intangible* property rights may be "taken" by appropriation. There are two approaches to this problem. One might be called the strict; the other the liberal.

> The strict conception of a "taking" within the meaning of the constitutional expression has been held to require a physical invasion of the property affected by appropriation.[48]

On the other hand,

> The modern and prevailing view is that any substantial interference with private property which destroys or lessens its value, or by which the owner's right to its use or enjoyment is in any substantial degree abridged or destroyed, is, in fact and in law, a "taking" in the constitutional sense, to the extent of the damage suffered, even though the title and possession of the owner remains undisturbed.[49]

Where, then, does Ohio stand on this issue? This precise question was involved in *Pontiac Improvement Co.* v. *Board of Com'rs.*[50] In that case one of the powers given a park board was the "power to acquire lands . . ." by gift or appropriation and "either the fee or any lesser interest may be acquired."[51]

Acting under this grant of power, the Board appropriated a parcel of land in fee and then as to the adjacent parcel, appropriated:

> Ninth. The right to prevent the erection or maintenance of any billboard, signboard, or other advertising device (other than a signboard or advertising device offering for sale or lease all or a part of the premises upon which it is erected) upon the premises last described [i.e. not appropriated in fee], in such manner or location as to be seen from any portion of said park or parkway within the valley of Rocky river.[52]

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[46] OHIO CONST. ART. 19 §1 (1851).

[47] See note 8 *supra.*

[48] 2 NICHOLS ON EMINENT DOMAIN §6.2 (1954).

[49] *Id.* at §6.3.

[50] 104 Ohio St. 447, 135 N.E. 635 (1922).

[51] *Id.* at 453.

[52] *Id.* at 450.

This was the ninth of ten Provisions in the Park Board's petition to appropriate. The court held the attempted appropriation invalid, stating: "It must be conceded that the use for which the property is taken must be a *public use*, and the property must be *taken*."[53] The court said further that, "The Constitution and the statute contemplate the physical possession and use, and not the regulatory power which the state might exercise under the police power."[54]

In the third paragraph of the syllabus in that case the Supreme Court stated:

> The phrase, "where private property shall be taken for public use," contained in section 19, article 1, of the Constitution of Ohio, implies possession, occupation and enjoyment of the property by the public, or by public agencies, to be used for public purposes.

This is the strict view set out in Nichols on Eminent Domain.[55]

It is not clear from the opinion whether the requirements of possession, occupation and enjoyment were essential to a taking or a limitation on what would be considered a public use. However, since "taking" here was held to be a prerequisite for "public use", the requirement was engrafted on every appropriation. Obviously this restriction severely limited the exercise of the power of eminent domain, and would, apparently prohibit the appropriation of intangible interests in property where the owner remained in possession.

This holding of the *Pontiac* case was not seriously questioned until 1953 when the Supreme Court decided *State ex rel. Bruestle v. Rich.*[56] In that case, the city of Cincinnati authorized the acquisition of certain lands which were termed "blighted" areas for the purpose of destroying the existing structures and creating a housing project in cooperation with the federal government. The plan entailed the condemnation of the land and subsequent sale of the same land to private developers. The city officials refused to carry out the project and the city solicitor instituted a proceeding in mandamus to force action. It was contended, on the basis of the holding of the *Pontiac* case, that "the Ohio Constitution prohibits the exercise of the right of eminent domain where there will ultimately be no use or right of use of the property taken on the part of the public or some limited portion of the public . . ."[57] The Supreme Court denied this contention, however, saying that:

> . . . the decision in that [Pontiac] case could rest either upon the statement of law set forth in the first paragraph of the syllabus or that in the second paragraph of the syllabus. So far as the third paragraph of the syllabus supports the contention of the

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[53] *Id.* at 457.

[54] *Id.* at 464.

[55] See quote at note 48 *supra.*

[56] 159 Ohio St. 13, 110 N.E. 2d 778 (1953).

[57] *Id.* at 26.

> respondents, it appears to be contrary to the intention expressed by the words used in Section 19 of Article I of the Constitution.[58]

The Court further held that the only limitation on the purpose for which the power of eminent domain could be expressed was that it be for the "public welfare". The court added that "in that section [Article I, Section 19] of the Constitution, they [the people] regarded property taken for 'the public welfare' as property 'taken for public use'."[59]

It is unfortunate that the court in this case did not state more clearly what effect its decision had on the holding of the *Pontiac* case instead of leaving to speculation the extent to which the *Pontiac* case is overruled. It had early been held that there can be a "taking" without physical dispossession such as where there is a change of grade.[60] Therefore the *Pontiac* requirements of occupation and possession would appear to have been requirements of "public use". The opinion in the *Pontiac* case implied that "public use" necessitated physical possession. The court quoted Lewis on Eminent Domain that " 'Public use' means the same as use by the public, ..."[61] Thus, the *Rich* holding, that the limitation is "public welfare" and not "public use" appears to overrule the strict requirement of occupation and possession.

It should be noted, however, that the *Rich* case is open to an alternative interpretation. In that case there was some occupation and possession by the public during the time the buildings were being removed from the blighted area. Thus if *Pontiac* stands for the proposition that a "taking" requires physical occupation and possession, it can be argued that the *Rich* concept of "public welfare" does not affect those requirements.

Serious doubt is cast on this latter analysis by the later case of *St. Stephen's Club v. Youngstown Metropolitan Housing Authority*[62] where the property appropriated by a housing authority was not within the slum cleared area. When this case was in the Court of Appeals that court held:

> . . . conferring power of eminent domain upon metropolitan housing authorities is a valid constitutional enactment in the interest of public welfare.

To the objection that the property was not a slum area the court said:

> We think the argument advanced by the appellant that the authority may not proceed in this case because the land is vacant and not located within a slum area is untenable. There is no such limitation in the housing act.[63]

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[58] *Ibid.*

[59] *Ibid.*

[60] See Crawford v. Delaware, note 12 *supra.*

[61] Note 45 *supra* at 459.

[62] 160 Ohio St. 194, 115 N.E. 2d 385 (1952).

[63] 95 Ohio App. 113, 115 N.E. 2d 82, 88 (1952).

The case was appealed to the Supreme Court which affirmed. In referring to the requirements for public use, the court stated that "Subserviency to public welfare is a broader restriction upon private rights in property than subserviency to *actual* use by the public."[64] (Emphasis supplied.)

Thus it appears that the *Rich* case rejected the concept of "public use" in favor of "public welfare" and the *St. Stephen's Club* case has re-emphasized that there is now no requirement for actual possession by the public.

The exact problem of power to appropriate the intangible right to erect billboards arose again in the recent case of *Ellis v. Ohio Turnpike Commission.*[65] In this case the statute provided:

> The Commission is hereby authorized and empowered to: . . . (I) Acquire, . . ., by purchase or otherwise, . . ., such public or private lands, . . ., or parts thereof or rights therein, rights of way, property, rights, easements and interests as it deems necessary for carrying out Sections 5537.01 to 5537.23, ...[66]

Pursuant to this authority, the Turnpike Commission adopted a resolution appropriating, in addition to the turnpike right of way the following:

> Second, all rights to erect on any of the aforesaid remaining lands any billboard, sign, notice, poster, or other advertising device which would be visible from the travelway of Ohio Turnpike project No. 1, and which is not now upon said lands.[67]

The supreme court invalidated this appropriation saying:

> . . . we do not believe it [the statutory authority given the Turnpike Commission] can reasonably be said to comprehend the appropriation of lands and uses thereof *such as are here involved* which are not necessary in the construction and operation of a turnpike proper.
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> . . . If specific authority should be forthcoming, we suppose further problems and further litigations might occur, but they are merely anticipatory and of no present concern.[68] (Emphasis Supplied.)

The court seems to be saying that the right to erect billboards is "property" and indicates it is possible for the legislature to grant authority to appropriate the right if the grant of authority is specific. It is significant here to note also that Judge Lamneck in his concurring opinion thought both that the right to erect billboards is subject to appropriation and that the authority was

> . . . sufficiently comprehensive to permit the Turnpike Commission to adopt a resolution, or resolutions, for appropriation

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[64] Note 62 *supra* at 199.

[65] 162 Ohio St. 86, 120 N.E. 2d 719 (1954).

[66] OHIO REV. CODE §5537.04 (I)

[67] Note 65 *supra* at 92.

[68] *Id.* at 93-4.

> which will eliminate billboards and other advertising media in close proximity to a turnpike which tend to affect safety of travel on a turnpike.[69]

It would therefore seem now that the holding of the syllabus of the *Pontiac* case has been finally laid to rest and that the court has opened the door to the use of eminent domain to appropriate the right to erect billboards.

Both the *Pontiac* case and the *Ellis* case, however, reveal a further problem in that of describing the interest taken with sufficient definiteness to apprise the owner of the extent of the taking. The vagueness in the appropriation resolution in the *Ellis* case arose from the use in the resolution of the word "visible" to describe the distance in which billboards were prohibited.[70] The court said:

> . . . We are of the opinion that the adopted resolution quoted above is too indefinite and uncertain to be valid and enforceable. The word "visible" standing alone is vague and ambiguous.[71]

The court indicated its concern with distance when, referring to the interpretation of the word visible, it asked "What approximate distance in feet or yards is involved?" Judge Lamneck accentuated this concern in his concurring opinion when he said:

> . . . In the absence of specific legislative authority defining authority of the Turnpike Commission relative thereto, the necessity of such appropriation must be clearly shown, and the appropriation resolution therefor must be confined to reasonable and definite territorial limits . . . .[72]

Thus, it would appear that the replacement of the word "visible" in the appropriation resolution with a reasonable, definite distance would satisfy the requirements of definiteness.

CONCLUSION

That the problem of regulation of billboards is a complex one, cannot be denied nor minimized. However, the history of their regulation by municipalities indicates that the problem is capable of solution. There are several alternative and supplemental solutions to the problem from a legal standpoint. Which solution is feasible from an economic or political standpoint is a legislative policy matter not here considered.

Control of billboards along state highways appears possible by the use of either the police power or eminent domain or a combination of them.

If regulation by police power is to be sustained, it must bear a reasonable relation to public welfare. Basically, the problem is whether there is sufficient evidence to show that the presence of billboards con-

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[69] *Id.* at 95.

[70] See resolution cited at note 67 *supra.*

[71] Note 65 *supra* at 93.

[72] Note 65 *supra* at 95.

tributes to traffic hazards. If this type of regulation is to be used it should be preceded by thorough study by the legislature. Data should be gathered to support the legislative action. If the legislature conducts such a study and enacts a statute in light of what it finds to be the present day needs of the public, there is good reason to suppose its action will be sustained.[73]

It appears that the barriers created in the *Pontiac* case, preventing the use of eminent domain to appropriate intangible rights, have now been effectively overruled or explained away. One writer thinks the use of eminent domain to prevent billboards is impractical because of difficulty in assessing the value of the property interest taken.[74] However, the court in the *Ellis* case made no mention of worry over such difficulty. It is arguable that if the public needs private property it should be willing to pay for it and that eminent domain should be used if possible. In any event, eminent domain should be given serious consideration for use with respect to existing structures.

Bernard V. Fultz

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[73] An example of how "conscientious effort and thoroughness" on the part of a legislature can affect judicial attitude is illustrated in Nebbia v. New York, 291 U. S. 502 (1934). That case involved statutory fixing of the price of milk. The legislature made extensive studies of the problems in the milk industry. The United States Supreme Court said:

> . . . appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixed prices reasonably deemed by the legislature to be fair . . .

[74] Henry W. Proffitt, *Public Esthetics and the Billboard,* note 6 *supra.*

The Felony Murder Rule In Ohio

Although today the criminal law is composed almost entirely of statutory law, an understanding of the old common law concepts is necessary for a complete mastery of the subject since invariably the courts turn to these concepts in construing the more modern statutes. It is, perhaps, an anomaly that our complex societal contacts are based to a large extent on the same general rules of conduct that were used to deal with such medieval situations as those picturesquely referred to as "sudden affrays". For this reason a reappraisal of our thinking on the subject and a determination of whether there is an exigency for these old rules in our contemporary civilization would seem appropriate. This paper takes one of those rules and analyzes it and its development in Ohio with an eye toward determining whether or not it still has a place in our body of law.

Felony Murder At Common Law

At common law murder was defined as homicide with malice aforethought. Malice aforethought consisted of any of the following states of mind:

(a) An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not.

(b) Knowledge that the act or omission which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.

(c) An intent to commit any felony whatever.

(d) An intent to oppose by force any officer of justice in arresting or keeping in custody a person whom he has a right to arrest or keep in custody, or in keeping the peace.[1]

The felony murder rule as originally stated by Coke classed any death resulting from an unlawful act as murder. During the years of its development this rule was considerably limited.[2] Foster's definition thereafter narrowed Coke's extremely harsh rule to include only unlawful acts that were felonies.[3] In 1883 Judge Fitzjames Stephen wrote his landmark opinion in *Regina v. Serne*.[4] In this case the defendant had been indicted for the murder of a boy who had died as the result of a fire set by the defendant. Judge Stephen instructed the jury:

> I think that, instead of saying that any act done with intent to commit a felony and which causes death amounts to murder; it would be reasonable to say that any act known to be dangerous to life, and likely in itself to cause death, done for the pur-

[1] 3 Stephen, History of the Criminal Law of England 21 (1883).

[2] Coke, Third Institute 56 (6th ed. 1680).

[3] Turner, Kenney's Outlines of Criminal Law 126 (1952).

[4] 16 Cox C.C. 311, 313 (1887).

> pose of committing a felony which caused death should be murder . . . In the present case . . . it is alleged that he [the prisoner] arranged matters in such a way that any person of the most common intelligence must have known perfectly well that he was putting all those people in deady risk.

It has been suggested that the present law of England is based on this statement of the rule by Stephen.[5] However, the later English decisions do not seem to follow Stephen strictly and it seems enough to sustain a conviction of murder that a person kill another by an act of violence in the course of or in the furtherance of a felony involving violence.[6] The general American view of the rule appears to be that a conviction for first degree murder follows where the killing occurred while the accused was engaged in the commission of certain felonies, usually enumerated by statute, notwithstanding the fact that there was no design to effect death.[7]

STATUTORY ADOPTION OF THE FELONY MURDER RULE IN OHIO

Most American jurisdictions specify certain felonies; usually arson, rape, robbery and burglary which make a killing occurring during their commission murder in the highest degree.[8] Five states, like New York, make a killing during the commission of any felony murder in the highest degree.[9] The present Ohio Statute, which is OHIO REV. CODE SECTION 2901.01 (12400) (12399) reads as follows:

> No person shall purposely, and either of deliberate and premeditated malice, or by means of poison, or in perpetrating or attempting to perpetrate rape, arson, robbery, or burglary, kill another.
>
> Whoever violates this section is guilty of murder in the first degree and shall be punished by death unless the jury trying the case recommends mercy, in which case the punishment shall be imprisonment for life.
>
> Murder in the first degree is a capital crime under Sections 9 and 10 of Article I, Ohio Constitution.

The first legislation on the subject of murder in Ohio was under the territorial organization of 1788 in which the common law definition

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[5] HALSBURY'S LAWS OF ENGLAND §749 (2d ed. 1933).

[6] Director of Public Prosecutions v. Beard, A.C. 479 (1920). This would appear to place the English view of the felony murder rule midway between the definitions of Foster and Stephen. Perkins, *A Re-examination of Malice Aforethought*, 43 YALE L.J. 537, 559 (1934).

[7] 1 WARREN, HOMICIDE §74 (1914). See State v. Glover, 330 Mo. 709, 50 S.W. 2d 1049 (1932) which contains an excellent discussion of the American view. See also 87 A.L.R. 414 for a discussion of the causal relation between the underlying felony and the killing.

[8] 1 *id.* §§4-53.

[9] Full treatment is given to the statutory provisions of all the states in an excellent study of the New York felony murder rule. See Arent & MacDonald, *The Felony Murder Doctrine and its Application Under the New York Statutes*, 20 CORNELL L.Q. 288 (1934).

of criminal homicide was strictly followed with no division of the crime into degrees.[10] In 1804 this Statute was renacted by the first session of the Ohio General Assembly in the following language:

> Sec. 2. *And be it further enacted*, that if any person of sound memory and discretion, shall unlawfully kill any human being and in the public peace, with malice aforethought, either express or implied, and being thereof legally convicted shall suffer death.[11]

In 1815 the common law definition of murder was repealed and the crime was specifically into two degrees.[12] The statute defining first degree murder was worded:

> That if any person shall purposely, of deliberate and premeditated malice, or in the perpetration or attempt to perpetrate any rape, arson, robbery or burglary, kill another, every such person, or his or her aiders, abettors, counsellors and procurers shall be deemed guilty of murder in the first degree, and upon conviction thereof suffer death.[13]

This statute was reenacted in 1821[14] with the addition of commas after the words "perpetration", and "perpetrate" and the substitution of a semi-colon for the comma after "another". In 1824 the twenty-second general assembly reenacted the statute leaving out the commas after "perpetration" and "perpetrate"[15] and this was subsequently reenacted again by the twenty-ninth general assembly in 1831.[16] In 1835 this statute was repealed and the following statute substituted:

> That if any person shall purposely and of deliberate and premeditated malice, or in the perpetration or attempt to perpetrate any rape, arson, robbery or burglary, or by administering poison or causing the same to be done, kill another,—every such person shall be deemed guilty of murder in the first degree, and upon conviction thereof shall suffer death.[17]

This was the statute in force at the time the landmark case of *Robbins v. The State*[18] was decided. The court held that even where the killing was "by administering poison" under the statute then in force, an intent or purpose to kill was an essential element of the crime of first degree murder. Apparently Chief Justice Bartley, who wrote the opinion in the *Robbins* case had before him "Curwen's Laws of Ohio in Force 1854". In that reproduction of Ohio laws the first degree murder statute received a minor, but highly significant change. After the word "purposely"

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[10] Robbins v. State, 8 Ohio St. 131, 185 (1857); see also 1 Laws of N.W. Terr. 18 (1791).

[11] 3 Ohio Laws 2.

[12] 13 Ohio Laws 86.

[13] 2 Chases' State 856.

[14] 19-21 Ohio Laws 186.

[15] 22 Ohio Laws 158.

[16] 29 Ohio Laws 136.

[17] 33 Ohio Laws 33.

[18] 8 Ohio St. 131 (1857).

a comma had been added. If there had been no comma there, it seems possible that the majority might have held the word "purposely" to modify merely the first clause.[19] However, with the addition of the comma it was held that "purposely" modified all three clauses, thereby adding the requirement of specific intent to the felony murder clause. It must be admitted that Bartley's decision was not based entirely on principles of grammatical construction. It is conceivable that even had he had a correct version of the statute before him that he would have held the same way since he based his decision in part on the fact that the "reason and spirit of the statute" contemplated proof of an actual intent to kill.[20] Subsequently, the legislature not only adopted the doubtful interpretation of the *Robbins* case, but added the words "and either."[21] In 1898 the language was not altered, but a provision for mercy on the recommendation of the jury was added.[22] There has been no substantial change in the language of the statute since that time. Since the *Robbins* case the court has adhered to that construction of the statute and its subsequent legislative adoption in continuing to construe "purposely" as modifying all three clauses.

In *State v. Turk*[23] the defendant procured others to set fire to his store with an eye to collecting on the insurance. The fire resulted in the death of several persons. The defendant was convicted of first degree murder. The Supreme Court of Ohio reversed pointing out that the statute requires a specific intent to kill; in this case no such intent had been shown.[24] The defendant had committed arson which was an unlawful act, but an unintended death that occurs during the commission of an unlawful act is manslaughter and not first degree murder.[25] In many other cases the *Robbins* decision has been consistently followed and it can be equivocally stated that Ohio requires a specific intent to kill in felony murder cases.[26]

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[19] 8 Ohio St. at 175-76. For a complete analysis of the *Robbins* case see the opinion of Justice Taft in State v. Farmer, 156 Ohio St. 214, 218, 102 N.E. 2d 11 (1951).

[20] 8 Ohio St. at 173-75, Judge Taft, however, feels there is little doubt on this question. See his opinion in the *Farmer* case at 220.

[21] 11 REVISED STATUTES OF OHIO c. 3 §6808.

[22] 93 Ohio Laws 223.

[23] 48 Ohio App. 489 (1934), *aff'd*, 129 Ohio St. 245.

[24] The *Turk* case has been criticized as being an unnecessarily narrow construction of the statute. See note 26 J. CRIM. L. 126 (1935-36). The major point of criticism seemed to be based on the fact that in Illinois a conviction of murder has been sustained under a similar fact situation in People v. Goldvarz, 346 Ill. 398, 178 N.E. 892 (1931). The Illinois statute, however, differs considerably from the Ohio statute. ILL. ANN. STAT. c. 38 §358 (1935).

[25] CLARK & MARSHALL, CRIMES §262 (5th ed. 1952).

[26] Kain v. State, 8 Ohio St. 306 (1858); Erwin v. State, 29 Ohio St. 186 (1876); Stephens v. State, 42 Ohio St. 150 (1884); State v. Leuth, 5 Ohio C.C. 94, 3 Ohio C. Dec. 48 (1891); Blair v. State, 5 Ohio C.C. 501, 3 Ohio C. Dec. 242 (1891); Jones v. State, 14 Ohio C.C. 35, 7 Ohio C. Dec. 305 (1897); State v. Jones

Any apparent deviations which might be cited as approving any other rule can be explained on the basis of a confusion between the requirement of actual intent on the one hand and problems of evidence encountered in the proof of that intent on the other hand. The requisite intent must always be shown, but it may, of course, be inferred from the facts and circumstances.[27] An illustration of this confusion is found in the case of *State v. Salter*.[28] In that case the defendant had chloroformed a girl and raped her. When she subsequently died he was indicted for first degree murder. His conviction was sustained on the grounds that the trial judges, sitting without a jury, had found all the essential elements of the crime including the *intent to kill*.[29] The Court, however, went further and in the latter part of its opinion intimated that if the defendant has the intent to commit the underlying felony he then has the intent to kill. Thus the *Salter* rule seems to be:

> From such circumstances and from the intent to do the act that resulted in death, the intent to kill, which is contemplated in Section 12400, General Code, may be established beyond a reasonable doubt.

This rule seems clearly wrong in light of the *Robbins* case, and the *Salter* court's attempt to distinguish away *Robbins* on the basis that in that case, instructions to the jury were involved while in *Salter* they were not, seems inadequate.

Whatever doubt the *Salter* case cast in this field has been removed by a recent expression of the law of felony murder by the Ohio Supreme Court in *State v. Farmer*.[30] Here the defendant had killed a man while perpetrating a robbery. His conviction for first degree murder was reversed because the record failed to disclose sufficient evidence from which the jury could have inferred a specific intent to kill. The Court reaffirmed the view that intent to kill is necessary to sustain a conviction

5 N.P. 390, 8 Ohio Dec. 645 (1898); State v. Del Bello, 8 Ohio Dec. 455 (1898); State v. Atkinson, 6 N.P. 232, 8 Ohio Dec. 405 (1899); State v. Lukens, 6 N.P. 363, 9 Ohio Dec. 349 (1899); State v. Strong, 12 Ohio Dec. (N.P.) 698 (1902); State v. Schiller, 70 Ohio St. 1, 70 N.E. 505 (1904); State v. Knapp 70 Ohio St. 380, 71 N.E. 705 (1904); State v. Oppenheimer, 49 Ohio L. Bull. 257 (1904); Bailus v. State, 16 Ohio C.C. 226 (1904); State v. Mueller, 6 Ohio L. Rep. 542 (1908); State v. Pierce, 24 Ohio N.P. (N.S.) 413 (1921); Hoppe v. State, 29 Ohio App. 467, 163 N.E. 715 (1928); State v. Turk, note 21, supra; Malone v. State, 130 Ohio St. 443, 200 N.E. 473 (1936); State v. Colley, 46 Ohio L. Abs. (1946); State v. Farmer, note 18 *supra*.

[27] State v. Huffman, 131 Ohio St. 27, 1 N.E. 2d 313 (1936); Munday v. State, 50 Ohio C.C. (N.S.) 656, 16 Ohio Cir. Dec. 712 (1904), *aff'd* 72 Ohio St. 614 (1905); State v. Mueller, 6 Ohio L. Rep. 542 (1908). The state is aided by a presumption that one intends the natural and probable consequences of his act. State v. Del Bello, 8 Ohio Dec. 455 (1898); Jones v. State, 51 Ohio St. 331, 38 N.E. 79 (1884); Ridenour v. State, 38 Ohio St. 772 (1882). This presumption is naturally not conclusive. See note 21 U. OF CIN. L.R. 201 (1952).

[28] 149 Ohio St. 264 (1948).

[29] See note 9 OHIO ST. L.J. 352 (1948).

[30] 156 Ohio St. 214, 102 N.E. 2d 11 (1951).

under the felony murder rule in Ohio. If *Salter* says that the defendant need not have a specific intent to kill then it is certainly overruled by the *Farmer* case. In any event there appears to be little doubt that the latter case represents the law of Ohio.[31]

An interesting aspect of the *Farmer* case is the court's expression of the so-called deadly weapon doctrine. The court indicated that the use of a weapon likely to produce death or serious bodily harm and which actually does result in death will, in the absence of explanation, be sufficient evidence from which an intent to kill may be inferred. On the other hand if the instrument used is not likely to produce such a result then the finding is not justified in the absence of other evidence. In this, the court is aided by the presumption that one intends the natural and probable consequences of his acts. Therefore it is possible that had the weapon been found in the *Farmer* case the result might have been different. Likewise if the wounds had been fresh then the undertaker might have been able to offer opinion evidence that the decedent had been struck by a deadly weapon.

The construction placed on the Ohio first degree murder statute by the court in the *Robbins* case and subsequent decisions was not necessarily inevitable. An Oregon court faced with the problem of construing a statute similar to the Ohio statute refused to adopt the view of the Ohio court in the *Robbins* case.[32] Nebraska's Criminal Code of 1873 was adopted largely from the Ohio code and eventually, as might be expected, the same problem of construction arose there. The Nebraska court evidently thought little of the *Robbins* decision and found enough difference between the two statutes to justify their not adopting the strict Ohio construction.[33] The District of Columbia in construing a similar statute took the Ohio view and cited both the *Robbins* and the *Turk* cases.[34] It should be noted, however, that four years later Congress enlarged the scope of the first degree murder statute in the District of Columbia by adding the words, "or without purpose to do so" before the enumerated felonies.[35]

Duration of The Felony

In addition to specifically enumerating the felonies a number of other techniques have been employed to limit the application of the traditional felony murder rule. The reason for these limitations is the same reason for the division of murder into degrees *viz.* to limit the number of capital punishments.[36]

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[31] Hart & Hart, *Review of Ohio Case Law for 1951*, 47 Ohio Op. 287, 306 (1952).

[32] State v. Brown, 7 Ore. 187, 198 (1879).

[33] Rhea v. State, 63 Neb. 461, 88 N.W. 789 (1902).

[34] Jordon v. United States, 87 F. 2d 64 (1936).

[35] 1 D.C. Code §22-2401.

[36] Clark & Marshall, *op. cit. supra* note 25, §249; Beccaria, Crimes and Punishments 97 et. seq. (1372); Michael & Wechsler, *A Rationale of Homicide*, 37 Colum. L.R. 701 (1937).

As has been pointed out earlier New York does not limit the felony murder rule through a specific enumeration of the felonies to which it can be applied;[37] however, the New York courts do employ another limitation by requiring the felony to be independent of the homicide.[38] By this they mean that if one assaults another with the intent to kill, injure or resist arrest and does in fact kill the one assaulted then the assault while it is felonious is "dependent" and hence will not support a conviction under the felony murder rule. As Michael and Wechsler point out,[39] there has been no analysis of this test of "independence", however to hold otherwise would erase any distinction between first and second degree murder because every killing arising out of a felonious assault would automatically be first degree murder under the felony murder rule. The paradox of this limitation is that if one feloneously assaults another and in the process kills a third person then the felony murder rule applies, but if the assaulted person dies it does not apply as to his death.[40]

For a killing to have been done during the perpetration or commission of a felony and thus fall within the statutory language of most jurisdictions, it is necessary that there be a spatial and temporal connection between the underlying felony and the killing. The killing must have occurred during the duration of the felony, *i. e.*, at a point sometime before the actual termination of the felony. This gives rise to another means of limiting the scope of the felony murder rule, *i. e.*, by narrowing the limits of the underlying felony it is possible to exclude a killing from the felony and thus avoid application of the rule. Thus where A and B committed a robbery at 2 A.M. and after stopping to eat were apprehended by police 60 miles and 2 hours away from the robbery and as a result of this apprehension a killing resulted, then serious doubt arises as to whether this killing could be considered within the limits of the original robbery.[41] It seems well settled that the felony begins when the criminal attempt is committed.[42] However, when the felony is held to have terminated varies from jurisdiction to jurisdiction. The New York Court has apparently set rather narrow limits to the time period during which a felony may be considered to be in progress for the purposes of the felony murder rule. Thus the killing must occur while the actor is engaged in doing something immediately connected with the underlying crime, such as securing the plunder.[43] In Ohio,

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[37] See note 8 *supra.*

[38] MICHAEL & WECHSLER, CRIMINAL LAW & ITS ADMINISTRATION 218 (1940).

[39] *Ibid.*

[40] People v. Wagner, 245 N.Y. 143, 156 N.E. 644 (1927).

[41] In State v. Metalski, 116 N.J.L. 543, 185 Atl. 351 (1936), the majority felt that such a killing did occur within the limits of the robbery, but a well reasoned dissent felt otherwise.

[42] People v. Sullivan, 173 N.Y. 122, 65 N.E. 989 (1903).

[43] Arent & MacDonald, *supra* note 9, at 305.

however, a broader rule is followed. The Ohio courts say that if there is a killing within the res gestae of the initial crime then the killing is murder for the purpose of the rule.[44]. This is obviously a nebulous criterion and it would be difficult to predict how a court would hold on any given set of facts. Logically one might think that the question might arise as to whether an Ohio court would react differently depending on whether the underlying crime was robbery or burglary. It might be argued that there should be a distinction since the crime of burglary is complete upon the breaking and entry and the crime of robbery continues with the asportation of the stolen goods.[45] Some courts have had difficulty with this distinction,[46] but in view of the broad scope of the res gestae rule it seems unlikely that Ohio courts would make any distinction. This is borne out by the fact that the *Habig* case, a robbery case, adopted and accepted the reasoning of the *Conrad* case which involved a burglary.[47]

Responsibility of The Accomplice Under The Felony Murder Rule

As early as 1536 it was held that if a person was killed accidently by one of the members of a band all could be held guilty of murder.[48] Today the ordinary rules that govern the liability of accomplices[49] extend to felony murder situations.[50] This is also true in Ohio although one might suspect that the requirement of specific intent to kill on the part of the killer would prevent a conviction of an accomplice if he, in fact, lacked the requisite intent. However, it seems well settled in Ohio that if the killer himself can be held then his accomplices can also be convicted.[51] This is true even though the homicide was not contemplated by the parties in their original design.[52] In Ohio, however, the requirement of specific intent would seem to eliminate a possibility of conviction where the death for which the conspirator is sought to be held is the result of the action of a non-participant in the underlying felony rather than the result of an act of his co-conspirator. This is the situation that would arise when A and B while robbing a store are challenged by C and as a result of the ensuing gunbattle D, a bystander, is killed. Some

[44] Conrad v. State, 75 Ohio St. 52, 78 N.E. 957 (1906); State v. Habig, 106 Ohio St. 151, 140 N.E. 195 (1922).

[45] Clark & Marshall, *op. cit. supra* note 25 §§371, 401.

[46] State v. Adams, 339 Mo. 926, 98 S.W. 2d 632 (1936).

[47] See 108 A.L.R. 848 (1937).

[48] Mansell & Herbert's Case, 2 Dyer's 128b (1536).

[49] Clark & Marshall, *op. cit. supra* note 25 §§157-92.

[50] 1 Warren, *op. cit. supra* note 7, §74. Also see 68 L.R.A. 193 (1922) for a long collection of cases on this point.

[51] Conrad v. State, 75 Ohio St. 52, 78 N.E. 957 (1906); Stephens v. State, 42 Ohio St. 150 (1884); Huling v. State, 17 Ohio St. 583 (1867); State v. Rogers, 64 Ohio App. 39, 27 N.E. 2d 791 (1938).

[52] Stephens v. State, *supra* note 51, intent to rob. See also Zeller v. State, 9 Ohio L. Abs. 490 (1930); Wilson v. State, 6 Ohio L. Abs. 478 (1928).

courts would hold A and B guilty of first degree murder even if C's bullets had killed D and regardless of whether A or B had an intent to commit the killing.[53]

EVALUATION OF THE FELONY MURDER RULE IN OHIO

The major objections to the felony murder rule as it is usually defined are that; the rule is too harsh because it includes accidental killings within its scope since it pays no heed to intent,[54] that it is objectionable because it holds an accomplice responsible for an unintended felony committed by another,[55] and that the broad extension of the res gestae includes acts that might otherwise be beyond the normal scope of the felony. Ohio's requirement of intent would seem to obviate the first objection. As to the second objection while it is true that accomplices will be held responsible for the acts of their coherts, this is not a result of the felony murder rule, but rather, the general rules applicable to parties engaged in criminal activity. Likewise the res gestae doctrine does prescribe indefinite limits, but it has been aptly pointed out that the most dangerous point in time during the commission of a felony comes at that moment when the felon is threatened with capture or arrest during his escape.[56] Without the broad res gestae doctrine such time might fall outside the limits of the felony murder rule and eliminate an area where it seems most applicable. Therefore it would appear that the Ohio rule either lacks or meets the usual objections to the rule. Yet it seems so ideal that it is really not the felony murder rule at all, since in Ohio the only result of the rule is to raise what might otherwise be second degree murder to first degree murder if the killing happened to have occurred during the commission of one of the enumerated felonies.

If one assumes that the usual rule is too harsh and then concludes that the Ohio rule is no rule at all, then what remains to be done? Should Ohio retain its present rule, adopt a more general rule such as the one followed by the New York courts or perhaps come up with a different solution altogether? Can anything good be said about the felony murder rule? Holmes thought so, he felt that the general test of murder was the degree of danger surrounding a certain pattern of behavior. If certain acts were to be regarded as being dangerous under certain circumstances then the legislature might make these acts punishable in a certain manner even though the danger was not generally known. Therefore if it is shown that deaths occur disproportionately in connection with other felonies then as Holmes put it:

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[53] Commonwealth v. Moyer, 357 Pa. 181, 53 A. 2d 736 (1947); Commonwealth v. Almedia, 362 Pa. 596, 68 A. 2d 595 (1949) and see generally 12 A.L.R. 2nd 210 (1950).

[54] Michael & Wechsler, *supra* note 36 at 1305.

[55] Eisenberg, *The Doctrine of Felony Murder in New York,* N.Y.L.J., Jan 17, 1935 at 296, quoted in Corcoran, *Felony Murder in New York,* FORDHAM L. REV. 43 (1937).

[56] Corcoran, *supra* note 55 at 73.

> The law may, therefore, throw on the actor the peril, not only of the consequences foreseen by him, but also of consequences which, although not predicted by common experience, the legislator apprehends.[57]

Holmes, however, seems to be an advocate of the same general philosophy that Coke had expressed and which we have rejected as being too harsh since it neither required intent nor foreseeability.

Yet even if we reject Holmes there does seem justification for the application of the felony murder doctrine as a rule of treatment if it can be shown that experience indicates that there is danger attendant that death may result from the commission of a felony. However, is the traditional felony murder rule the only answer? Professor Moreland feels that the felony murder rule was abolished by the decision in *Regina v. Serne*.[58] He would advocate removing the felony factor from the test completely by using as the test, was the act, in itself, extremely dangerous to human life and safety. As Moreland indicated this would place such cases directly into the class he terms as negligent murders.[59] Without going quite as far as Moreland, an answer might be found for Ohio by substituting for the requirement of specific intent, conduct which amounts to criminal negligence. Thus one would be liable under the felony murder doctrine if during the commission of a felony a death occurs as a result of an act, not intended to cause death, but which amounts to criminal negligence. Should this be the answer the question then becomes, how can the courts decide when a certain type of behavior falls within the area of criminal negligence.

In doing so the courts might well consider four factors:

1. *Risk.* What degree of risk was created by the act of the offender? Was it high, such as committing arson in a crowded tenement or low, such as a robbery in the middle of the desert?
2. *State of Mind.* Was the offender aware that he had created a homicidal risk, in short, was he acting inadvertently or advertently?
3. *Motive.* Was the offender's motive good, was he acting in the public interest?
4. *Justification.* Does society justify taking risks of this sort?

Applying this test to a case arising under a felony murder situation would seem to give a proper result and might well be the best answer to the problem. For example if during the commission of a felony a man creates a high degree of risk while acting advertently he would be convicted, whereas the man who creates a low degree of risk while acting inadvertedly would not. The difficulty with the application of this theory to the Ohio situation, however, is that Ohio apparently has no doctrine

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[57] HOLMES, THE COMMON LAW 57 (1881).

[58] MORELAND, LAW OF HOMICIDE 44 (1952).

[59] MORELAND, *op. cit. supra* note 58, at 50.

of criminal negligence.[60] The solution then would seem to be a revision of our first degree murder statute.

It is interesting to note that Ohio has a statute which makes a death resulting from the obstruction of a railroad track murder in the first degree[61] and it has been held that the intent to kill is not a necessary element in a case arising under that statute.[62] Thus it would seem that the Ohio legislature has no definite prohibition against the abolition of a specific intent to kill in murder cases.

The Ohio felony murder rule as it exists today is undoubtedly humane, but serves very little use in our criminal law. Because of the danger to large numbers of people that is possible in the felony murder situation there is justification for some type of a rule increasing the penalty in such cases. It is probably true that the ancient felony murder rule has no place in our modern society. For this reason the State of Ohio could well consider the adoption of the doctrine of criminal negligence, which would cover not only the felony murder situation, but also through a revision of the manslaughter statute adapt itself also to a number of other situations in which it might serve to deter socially undesirable behavior.

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[60] State v. O'Mara, 105 Ohio St. 94, 136 N.E. 885 (1922); Jackson v. State, 101 Ohio St. 152, 127 N.E. 870 (1920). The defendant's conduct has to have violated a state law and as a result of this violation a death results.

[61] OHIO REV. CODE §2901.02.

[62] Jones v. State, 51 Ohio St. 331, 38 N.E. 79 (1894).